88-91

No. 87-1968

In The

Supreme Court of the United States

October Term, 1987

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Respondents,

vs.

NORMAN L. WALKER, JOHN E. KANON,
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,
HARRY E. BABINGER, JAMES E. HADSEL,
YVONNE A. RIGATTI, GLENN TRAUTMAN,
WILLIAM W. RUHL, WILLIAM G. DODDS,
PATRICIA M. PRICE, CONCETTA SERDY,
and REID W. McGIBBENY, individuals,

Cross-Petitioners.

DINO BELLO, an individual and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Respondents,

vs.

MUNICIPALITY OF BETHEL PARK,

Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER ACTION BY LESS THAN A MAJORITY OF THE MEMBERS OF A MUNICIPAL LEGISLATIVE BODY CAN BE MUNICIPAL POLICY UNDER 42 U.S.C. § 1983.

II. WHETHER POLITICAL OR PERSONAL MOTIVES OF A MAJORITY OF THE MEMBERS OF A MUNICIPAL LEGISLATIVE BODY MAY BE CONSIDERED IF THERE IS A RATIONAL BASIS ON THE RECORD FOR THEIR OFFICIAL ACTIONS.

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No. 87-1968

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MUNICIPALITY OF BETHEL PARK,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross-Petitioners file the following Cross-Petition for Writ of Certiorari to the Supreme Court of the United States.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Opinion of the United States Circuit Court of Appeals for the Third Circuit is reported at 840 F.2d 1124. The Opinion of the District Court has not been reported in an official or unofficial reporter.

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STATEMENT OF THE GROUNDS FOR JURISDICTION OF THIS COURT

The date of entry of the Opinion of the United States Court of Appeals for the Third Circuit is March 1, 1988. A Petition for Writ of Certiorari was served on the Cross-Petitioners on June 1, 1988.

This Court has jurisdiction to review the order entered March 1, 1988 pursuant to 28 U.S.C. § 1254(1). This Cross-Petition has been filed timely pursuant to Rule 19.5 of Rules of the Supreme Court of the United States.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Pennsylvania Borough Code, Act of February 1, 1966, P. L. (1965) ————————, No. 581, 53 P.S. 46006 provides in pertinent part:

§ 46006. Duties of Council

It shall be the duty of the borough council:

(3) To enact, revise, repeal and amend such by-laws, rules, regulations, ordinances and resolutions, not inconsistent with the laws of the Commonwealth of Pennsylvania, as it shall deem beneficial to the borough and to provide for the enforcement of the same. The legislative powers of boroughs including capital expenditures not payable out of current funds, shall be exercised by or be based on an ordinance. All other powers shall be exercised by vote of the majority of council present at a meeting, unless otherwise provided. Routine, ministerial or administrative purchases and powers may be made and exercised by officers or committees, if authority therefore was previously given, or if the action is subsequently ratified by council. Whenever any action by council shall result in a specific contract or agreement, such contract or agreement shall be signed by the president of the borough council.

The Fifth Amendment to the United States Constitution Provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to the twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia (R.S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284).

STATEMENT OF THE CASE

Respondent Dino Bello is the principal shareholder of Simmons Park Properties, Inc. ("Simmons Park") also a respondent in this case (collectively referred to herein as "developer"). Simmons Park owns approximately 33 acres of land in Bethel Park Borough, the municipal petitioner herein. In July, 1976, Simmons Park submitted a site plan to Bethel Park for a 254 unit development containing townhouses and duplexes which was divided into five distinct phases. The site plan was approved on October 19, 1976 and Simmons Park completed construction of the 47 units in the first phase in the spring of 1979. In May, 1979 Simmons Park applied for building permits to continue developing townhouses in the area designated as the fifth phase. Bethel Park denied the

application based on the phased site plan and informed Simmons Park that permission would be granted next only for the second phase.

Simmons Park did not apply for permission to construct units in the second phase, but instead filed an action in mandamus on June 8, 1979 in the Court of Common Pleas of Allegheny County, Pennsylvania seeking issuance of a building permit to construct units in the fifth phase. Initially, the case was referred by the Court to a hearing officer who recommended that the request for a building permit be denied. By order dated March 26, 1980, a judge overruled that recommendation and instead ordered that the building permit be issued. However by Order dated January 27, 1981, that same judge vacated that previous order. After final hearing, another judge on that Court issued a final order requiring Bethel Park to issue the building permits based on a conclusion that there was no written agreement between the developer and the municipality requiring that the units be developed in phases. An appeal from that decision by Bethel Park was quashed for failure to perfect the appeal properly. *Bethel Park Municipal Council v. Simmons Park Properties, Inc.*, 448 A.2d 661, 68 Pa. Commonwealth Ct. 12 (1982).

On September 3, 1980, during the pendency of the state court action, respondents filed a complaint in the United States District Court for the Western District of Pennsylvania against Bethel Park's council members, zoning officers and municipal manager seeking monetary damages for violations of due process and equal protection rights and for violation of antitrust laws. On March

11, 1981, a similar complaint was filed against the municipality.

By Memorandum Order and Report and Recommendation the District Court's Chief Magistrate recommended that summary judgment be granted as to all defendants on all counts, which recommendation was affirmed by Order of a District Judge dated June 4, 1987. By Order dated July 22, 1987, the developer's motion to vacate which was based on the subsequent decision of this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* — U.S. —, 1075 S.Ct. 2378, — L.Ed. 2d — (1987) was denied. The developer appealed the granting of summary judgment to the United States Circuit Court for the Third Circuit.

By Order dated March 1, 1988, the Circuit Court affirmed dismissal of the action on procedural due process, equal protection, taking without just compensation and anti-trust grounds but reversed and remanded the case on the substantive due process grounds.

In reversing the District Court on the substantive due process issue, the Circuit Court disregarded the finding of the District Court that the permit application was denied based on the phasing requirement, and instead held that a factfinder must determine whether the permit was denied for lack of proper phasing or because of the political or personal motive of certain municipal council members. The Court made no distinction between actions by less than a majority of the members of council and actions by a majority of the members of council in their legislative capacity.

On June 1, 1988, the developer filed a Petition for Writ of Certiorari solely on the issue of whether the Circuit Court erred in ruling against him on the taking without just compensation issue.

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REASONS RELIED UPON FOR THE ALLOWANCE OF THIS PETITION

A. A MINORITY OF THE MEMBERS OF COUNCIL ARE NOT MUNICIPAL POLICYMAKERS

This action was filed by a developer against all members of a municipal council, two zoning officials, the borough manager and the municipality charging each of them *inter alia* with violating his substantive due process rights by failing to approve a zoning permit.

In refusing to grant summary judgment for the municipality and all officials on the substantive due process count, the United States Court of Appeals for the Third Circuit held,

> "The plaintiffs in this case present evidence from which a fact finder could reasonably conclude that *certain* council members, acting in their capacity as officers of the municipality improperly interferred with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits". (emphasis added)

As to the individual defendants, the rationale given by the Circuit Court is consistent with prior decisions of this Court. *See Newport v. Fact Concerts, Inc.*, 453

U.S. 247, 101 S. Ct. 2748, 69 L.Ed.2d 616 (1981); *Owen v. City of Independence,* 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). However, there is no sound legal basis for the Circuit Court's holding that the municipality may be bound under 42 U.S.C. § 1983 for a random act by a minority of the members of council.

As a starting point, the permit was denied by a zoning officer, solely on the basis of the facts unique to this one permit application. If that had been the extent of the municipal involvement in this case, it is clear that the erroneous denial of the application by that ministerial officer would not give rise to an action against the municipality under 42 U.S.C. § 1983, *City of St. Louis v. Praprotnick,* — U.S. —, 108 S. Ct. 915, — L.Ed.2d — (1988). However, here the developer has attempted to come within the purview of the statute by alleging that municipal policymakers, i.e. council members, became involved in the administrative process and for political or personal reasons persuaded the zoning officer to deny the permit. The Circuit Court's holding that the council members' actions, if they constitute less than a majority, rise to the level of municipal policy, has never been decided directly by this Court, but is inconsistent with the rationale and dicta in prior decisions of this Court.

In the *Praprotnick* case, *supra,* this Court held that the identification of policy making officials is a matter of state law. Here the municipality is a Borough and under the Pennsylvania Borough Code, council is the legislative body which may take official action only by vote

of the majority of the nine member council. *See* The Borough Code, Act of February 1, 1966 P. L. (1965) — No. 581 53 P.S. § 46006. Thus under State law, the actions of four council members has no legal effect. However, the decision of the Circuit Court gives policy making authority to four or less council members.

This departure by the Circuit Court from what has been regarded as municipal policy in all *Post-Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) decisions is dangerous and needs to be reviewed immediately by this Court. If the actions of any member of a legislative body can render a municipality liable under 42 U.S.C. § 1983, then municipalities will be vicariously liable for every loose cannon elected to office. That type of reasoning will insulate those individual officers from individual liability under the deep pocket theory of litigation and in most likelihood will encourage rather than discourage unconstitutional behavior. *Monell, supra* and its progeny were not intended to effect that result. Instead, only government policy promulgated pursuant to the recognized state procedure which in turn causes a denial of constitutional rights was intended to provide redress against the municipality.

Here, the purported acts were in reality tortious like those in *Oklahoma v. Tuttle,* 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985), but the acts were not done by the officials acting in their official legislative capacity. This Court held in *Praprotnick* that a decision of a low ranking municipal employer does not become elevated to the rank of municipal policy unless it is approved by the supervising

policy maker or it is one of a series of consistent decisions which manifest a custom or usage. Neither instance is present here. The supervising policy maker under state law is council acting as a body, not individual members of council. Further this denial of a permit was an isolated incident and there are no allegations that it was part of a usage or custom.

In *Pembauer v. Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), this Court held that municipal liability attaches under 42 U.S.C. § 1983 only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question". 106 S. Ct. at 1300. In discussing that holding, this Court stated that "if county employment policy was set by the *Board* of County Commissioners, only that *body's* decision would provide a basis for county liability". 106 S. Ct. at 1300, ftn. 12. Thus, this Court, at least in dictum, has expressly limited municipal liability for acts of members of the legislative branch to official acts done as a body. However, given the importance of this issue to municipalities, it is obvious from the Third Circuit's decision that this issue needs to be addressed directly by this Court.

B. THE CIRCUIT COURT MISAPPLIED THE RATIONAL RELATIONS TEST

If a majority of the members of council approved the denial of the permit, the Court below acted improperly in refusing to grant summary judgment not only as to the municipality but as to all other defendants as well.

The Circuit Court for the Third Circuit held that the municipality's act of withholding building permits would violate the developer's substantive due process rights if a fact-finder found that council members withheld the permits for partisan political or personal reasons; but, if the council members withheld the permit because of the developer's failure to build pursuant to the phasing sequences set forth in the site plan, that is "an arguably rational ground for the denial of the permit". By so holding, the Third Circuit disregarded this Court's prior rulings in which the rational relations test was applied and instead decided that substantive due process cases under 42 U.S.C. § 1983 should be decided under tort law rather than constitutional law principles.

In *State of Minnesota v. Clover Leaf Creamery Company,* 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981), this Court held that a legislative act may not be declared to be irrational under the Equal Protection Clause if "it is evident from all considerations presented to the [legislature], and those of which we may take judicial notice, that the question is at least debatable" 101 S.Ct. at 724. This same standard of review is equally applicable to substantive due process claims. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1981).

Here the Court found that the plan initially approved by council had five phases and that building permits were denied only after the developer deviated from the phasing schedule. The Court also quoted from the zoning inspector's affidavit that the decision to deny the building permits was made by him individually on the basis of the failure to follow the phasing schedule. Finally, the Court held

that failure to build pursuant to the phasing sequence was an arguably rational ground for the denial of the permit. Thus, even though the Court found the debatable basis for council's action if in fact a majority of the members of council did act on the zoning permit request, the Court held that a substantive due process violation could be found.

There is no support for that decision in any zoning cases decided by this Court. That holding has been rejected specifically by this Court in *Village of Arlington Heights v. Metro Housing Development,* 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) where this Court held that denial of a variance was to be reviewed as a legislative act and that if a rational basis could be found for the denial, the action of council must be upheld.

Review of zoning decisions by almost every other circuit court has been restricted to a determination as to whether there are *any possible* rational basis for the zoning decision. In *Shelton v. City of College Station,* 780 F.2d 475 (5th Cir., 1986), cert. denied 106 S. Ct. 3276 (1986), the Court *en banc* reversed a panel of its Court which like the Third Circuit held that it was the function of a federal court to determine whether there was a factual basis for denial of zoning approval. Instead the court *en banc* after a lengthy review of the function of a federal court in the zoning process held that substantive due process could be violated only if there was no debatable issue. The findings of the Third Circuit in this case that phasing could be a rational basis for the zoning decision would have led the Fifth Circuit to uphold the grant of summary judgment for the municipality.

This issue has been decided differently also in the First Circuit. In *Creative Environments, Inc. v. Esta-*

brook, 680 F.2d 822 (1st Cir. 1982) cert. denied 459 U.S. 989 (1982); *Quinn v. Bryson,* 739 F.2d 8 (1st Cir., 1984); *Cloutier v. Town of Epping,* 714 F.2d 1184 (1st Cir., 1983) and *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1982), developers were denied use of their land for long periods of time allegedly as a result of malice and harassing tactics by public officials against the developers. Regardless, the Circuit Court dismissed each developer's substantive due process claim based on the following reasoning:

> "Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a Federal Court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither, Congress nor the courts have, to date, indicated that section 1983 should have such a reach". *Creative Environments, Inc. v. Estabrook,* 680 F.2d at 831.

In *Rymer v. Douglas County,* 764 F.2d 796 (11th Cir., 1985) the Circuit Court dismissed a complaint in which a zoning decision was challenged based on allegations that the officials knew or should have known that their decision was wrong. That is essentially the same allegation as in this case since the developer has alleged that because phasing was eventually held not to apply that the municipal officials knew or should have known how the courts would eventually rule on the phasing issue. The Eleventh Circuit when faced with that situation rightfully held that upholding that claim would raise a tort to the stature of a constitutional violation. That is exactly what the Third Circuit has done.

The Third Circuit Court in its decision stated that its decision was consistent with the decision of the Fourth Cir-

cuit in *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir., 1983). However, even there the Court did not go to the extreme to which the Third Circuit did to intercede in a zoning dispute. In the *Scott* case, the Court applied correctly the rational relations test but found that the legislative body intervened in the municipality's ministerial permit issuance process for racial reasons without any conceivable rational basis. That is far different from a case where the Circuit Court specifically finds that the reason stated by the municipality for its action is a rational basis for the permit refusal but then holds that a fact finder may delve into the minds of the officials to determine whether they had personal or political reasons for the decision. That holding has not been adopted by any other Circuit Court.

Thus, this case not only presents itself with a situation where there is a split among the Circuit Courts as to the manner in which zoning decisions must be reviewed under the substantive due process clause, but it also is a case which highlights the fact that the apparently clear direction which this Court gave to the First, Fifth and Eleventh Circuit Courts needs to be more fully amplified so that zoning decisions may be reviewed consistently in the Federal Court system.

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CONCLUSION

For all of the foregoing reasons, the Cross-Petitioners respectfully request that this Court grant their Cross-Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Opinion and Order of the Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3504 and 87-3505

DINO BELLO, an individual

and

SIMMONS PARK PROPERTIES, INC.,
a corporation,

v.

NORMAN L. WALKER, JOHN E. KANON, JAMES M. MARTIN, JOSEPH J. URBANOWICZ, HARRY E. BABINGER, JAMES E. HADSELL, YVONNE A. RIGATTI, GLENN TRAUTMAN, WILLIAM W. RUHL, WILLIAM G. DODDS, PATRICIA M. PRICE, CONCETTA SERDY, AND REID W. McGIBBENY, individuals

Dino Bello and Simmons Park Properties, Inc.,

Appellants No. 87-3504

DINO BELLO, an individual

and

SIMMONS PARK PROPERTIES, INC.,
a corporation,

v.

MUNICIPALITY OF BETHEL PARK
Dino Bello and Simmons Park Properties, Inc.,

Appellants No. 87-3505

On Appeal from the United States District Court for the Western District of Pennsylvania

(D.C. Civil Nos. 80-1264 & 81-346)

Argued December 15, 1987

Before: SLOVITER and COWEN, *Circuit Judges*, and DEBEVOISE, *District Judge**

(Filed March 1, 1988)

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* The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

COWEN, *Circuit Judge.*

These cases arise from a municipality's delay in issuing a building permit. They require us to decide whether a person's constitutional right to due process can be violated when municipal officials process an application for a building permit pursuant to a constitutionally adequate procedure, but deliberately and arbitrarily abuse government power to deny the application. We hold that such acts can violate a person's right to substantive due process. One of the cases also presents the issue whether a lengthy delay in obtaining a building permit can result in an unconstitutional taking of property without just compensation. We hold that absent extraordinary circumstances not presented by this case, delays in issuing a building permit do not result in a "taking" of property such that just compensation is constitutionally mandated.[1] We will reverse the district court's grant of summary judgment in favor of defendants as to plaintiffs' due process claims, but will affirm the grant of summary judgment as to the remainder of plaintiffs' claims.

I.

Plaintiff Dino Bello is the principal stockholder of Simmons Park Properties, Inc. ("Simmons Park"), also a plaintiff in this case. In July of 1976, Bello and Simmons Park applied to the municipality of Bethel Park for review and approval of a subdivision plan. The site plan

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1. The plaintiffs also claimed that the defendants' actions violated their constitutional right to equal protection and federal antitrust laws. We find these contentions to be without merit and do not address them in this opinion.

they submitted indicated that the plan had five phases, numbered I through V, each separated by a boundary line.

The plan was eventually approved, and the plaintiffs had no difficulty obtaining building permits for phase I of the project. Forty-seven housing units, comprising phase I, were completed in the spring of 1979. In May of 1979 the plaintiffs applied for building permits allowing them to commence construction of the housing units comprising phase V of the project. Norman Walker, Bethel Park's Code Enforcement Officer, denied the plaintiffs' application, ostensibly because the plaintiffs sought to construct phase V of the project before completing phases II-IV. The plaintiffs, however, had never agreed to develop the project in the order suggested by the phases.

On June 8, 1979, Bello and Simmons Park instituted an action in mandamus in the Court of Common Pleas of Allegheny County seeking issuance of the permits and damages, and a peremptory judgment. The case was referred to a referee, who filed a tentative decision denying the motion for a peremptory judgment. On March 26, 1980, the court of common pleas granted peremptory judgment. On January 23, 1981, the court vacated its previous order and adopted the referee's decision. The court then held a hearing on the matter and on May 5, 1981, ordered the municipality to issue the building permits. An appeal from that order was quashed for failure to preserve objections.

On September 3, 1980, the plaintiffs filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Western District of Pennsylvania against the indi-

vidual defendants,[2] and on March 11, 1981, a separate complaint against the Municipality of Bethel Park. Plaintiffs alleged, essentially, that a number of municipal officials improperly influenced the decision to deny them building permits. These actions allegedly deprived them of their constitutional rights to due process and equal protection, and violated federal antitrust laws. An amended complaint filed against the individual defendants also alleged that these actions constituted an unconstitutional taking of property without just compensation.

The defendants moved for summary judgment on October 9, 1984, and the motion was referred to a magistrate for a report and recommendation. In support of their motion defendants presented, among other evidence, the affidavit of defendant Walker. Walker stated that he individually made the decision to deny the building permits on the basis that the plaintiffs sought to develop phase V before phases II-IV, and that no other defendant or town official influenced his decision making process.

In opposition to the motion, the plaintiffs presented evidence indicating that certain members of the town council were strongly opposed to multi-unit housing, including their project, and that two members of the council had personal animosity towards one of the plaintiffs' employees, Raymond Kirich. In particular, plaintiffs point

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2. The individual defendants, and their official Municipality of Bethel Park positions during the relevant time period are: Norman L. Walker, Code Enforcement Officer; James M. Martin, Municipal Manager; John E. Kanon, Director of Planning; Joseph J. Urbanowicz, Harry E. Babinger, James E. Hadsell, Yvonne A. Rigatti, Glenn Trautmen, William G. Dodds, William W. Ruhl, Concetta Serdy, Reid W. McGibbeny, and Patricia M. Price, members of the Municipal Council.

to the alleged acts and statements of defendants Yvonne Rigatti, whom Kirich had opposed in a municipal election, and Joseph Urbanowicz. According to the affidavits of Kirich and Bello, various defendant members of the council admitted in conversations that Rigatti and Urbanowicz had pressured them to hinder plaintiffs' development as long as Simmons Park employed Kirich. Bello's affidavit states that he discussed the matter of the permits with members of the council who told him that they spoke to defendant Walker regarding the issuance of the building permits.

The magistrate filed her report and recommendation on April 28, 1987, and recommended that the district court grant defendants' motion for summary judgment. After the plaintiffs filed objections to the report and recommendation, and the defendants responded to those objections, the district court granted the defendants' motion by order dated June 4, 1987.

The plaintiffs subsequently filed a motion to vacate the district court's order. They argued that in light of the Supreme Court's then recent decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S.Ct. 2378 (1987), the district court improperly dismissed their claim that the property was taken without just compensation. The plaintiffs' motion to vacate was denied by order dated July 22, 1987. The plaintiffs have filed a notice of appeal which specifies that they appeal from the district court's order of June 4, 1987.

II.

Our review of a district court's grant of summary judgment is plenary, *Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 142 (3rd Cir. 1987).

III.

The first issue presented by this case is whether the district court properly dismissed plaintiffs' constitutional due process claims by way of summary judgment. Plaintiffs assert that the defendants' actions violated their fourteenth amendment right to both procedural and substantive due process. We will consider each of these contentions separately.

A.

Plaintiffs argue that Bethel Park's delay in issuing them a building permit was a denial of property without predeprivation due process. *See Stana v. School Dist. of Pittsburgh*, 775 F.2d 122, 127-29 (3rd Cir. 1985). However, the determination whether to issue a building permit is an administrative decision, and it was the plaintiffs' decision to invoke that governmental mechanism by applying for the permit. This case does not involve a pre-deprivation denial of property, but rather a decision to deny a building permit. Nevertheless, the procedure at issue must comport with constitutional due process.

The issue presented by this case is similar to that presented in *Rogin v. Bensalem Twp.*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). In *Rogin*, the plaintiff argued that a Pennsylvania municipality's administrative land use decision violated his right to procedural due process. We held that the plaintiff had failed

to set forth a procedural due process claim where he "set forth [no] behavioral or structural allegations from which we can infer that [the] process was unconstitutional." *Id.* at 694. We noted that Pennsylvania's procedures for challenging zoning ordinances substantially conformed with the due process guidelines enunciated by the Supreme Court. *Id.* at 695.

Here, as in *Rogin,* Pennsylvania affords a full judicial mechanism with which to challenge the administrative decision to deny an application for a building permit. Indeed, the plaintiffs utilized that mechanism and obtained a building permit. While the Pennsylvania courts have ruled that the initial decision to deny the permit was wrong, the plaintiffs have not and cannot show that the decision was made pursuant to a constitutionally defective procedure.

It is the law in this Circuit that a state provides adequate due process when it provides " 'reasonable remedies to rectify a legal error by a local administrative body.' " *Cohen v. City of Philadelphia,* 736 F.2d 81, 86 (3d Cir.), *cert. denied,* 469 U.S. 1019 (1984)(quoting *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822, 832 n.9 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982)). Pennsylvania clearly provides such remedies, as this case exemplifies,[3] and therefore plaintiffs' have no justifiable due process claim.

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3. The plaintiffs' claim, to the extent it argues that delays in Pennsylvania's judicial process denied them procedural due process, points to alleged procedural defects which cannot be attributed to these defendants. Moreover, state judicial delay in a civil case must be more egregious than the delay in this case to constitute a denial of procedural due process.

B.

The plaintiffs' substantive due process claim has greater merit. Recent decisions of the Supreme Court and this Circuit have diminished the scope of the right to substantive due process. *See Rogin,* 616 F.2d at 689. Nevertheless, actions alleging violations of the right to substantive due process remain viable in certain circumstances, and we feel that such allegations are present in this case. We will reverse the district court's grant of summary judgment on this claim.

The Supreme Court has discussed the scope of the substantive due process right in a number of recent cases. In *Daniels v. Williams,* 474 U.S. 327 (1986), the Court, in holding that the due process clause was not implicated by a state's negligent deprivation of life, liberty or property, pointed out that the guarantee of due process has historically been applied to deliberate decision of government officials. *Id.* at 331. The Court noted that the clause was "'"intended to secure the individual from the arbitrary exercise of the powers of government,"'" *id.* (quoting *Hurtado v. California,* 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely,* 4 Wheat. (17 U.S.) 235, 244 (1819))), and distinguish the *Daniels* case from cases involving an abuse of power.

In the related case of *Davidson v. Cannon,* 474 U.S. (1986), the Court held that mere negligence on the part of a state does not amount to an abuse of state power such that constitutioned due process is implicated. Justice Blackmun, dissenting, noted that he agreed with the majority's conclusion that a "deprivation must contain some element of abuse of governmental power, for the 'touch-

stone of due process is protection of the individual against arbitrary action of the government.'" *Id.* at 353 (quoting *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974)). *See also Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 263 (1977) (constitutional due process right to be free of arbitrary or irrational zoning action); *Pace Resources, Inc. v. Shrewsbury Twp.,* 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied,* 107 S.Ct. 2482 (1987) (to demonstrate violation of right to substantive due process, plaintiff must show that land use regulation was arbitrary or irrational). These cases reveal that the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process.

This analysis is consistent with the Fourth Circuit's decision in *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983). In *Scott,* the plaintiff claimed that a town council improperly intervened in the municipality's decision whether to issue him a building permit. The Fourth Circuit held that because Scott was entitled to the building permit under South Carolina law, and had presented evidence that the council's interference was motivated by a lack of impartiality towards him, he had stated a claim that the municipality's action violated his right to substantive due process. *Id.* at 1417-21.

In this case, the district court distinguished *Scott,* and read our decisions in *Rogin* and *Cohen* as approving the approach adopted by the First Circuit in *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1983). In *Chiplin,* which also involved the denial of a building permit, the First Circuit held that "[t]he claim that denial of a permit was improperly motivated, unsupported by an allegation of the deprivation of a spe-

cific constitutional right, simply raises a matter of local concern, properly and fully reviewable in the state courts." *Id.* at 1527. The court stated that a "mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error." *Id.* at 1528.

Since *Rogin* and *Cohen*, we have addressed these issues in *Pace Resources Inc. v. Shrewsbury Twp.*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 107 S.Ct. 2482 (1987). In that case we were faced with a claim that a municipality's zoning regulation violated the plaintiff's right to substantive due process. We held that in such cases the plaintiff bears the burden of demonstrating that the regulation is arbitrary or irrational. *Id.* at 1035. We found it significant that the municipality could have had rational reasons for the regulation, and concluded:

> Because it appears that on the face of the amended complaint that the Township decisionmakers could have had rational reasons for the decisions contested here and because that complaint alleges no facts suggesting arbitrariness, it fails to state a substantive due process claim upon which relief can be granted.

Id. at 1036. We noted, however, that the plaintiff in *Pace* did "not present a case involving actions aimed at this developer for reasons unrelated to land use planning." *Id.* at 1035.

We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evi-

dence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits.[4] These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiffs' failure to build in numerical sequence, thus presenting an arguably rational ground for the denial of the permit, it is the factfinders' role to resolve this factual dispute. We will reverse the district court's grant of summary judgment on this claim.

IV.

We must also address whether the district court properly dismissed the plaintiffs' claim that the delay in issuing the building permit constituted an unconstitutional taking of property without just compensation.

---

4. The defendants also argue that the plaintiffs cannot make out a section 1983 claim against the municipality because they allege merely a single act—the withholding of a building permit—and thus cannot establish that the defendants acted pursuant to a municipal policy. See *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985). However, the Supreme Court's position in *Tuttle* was clarified by *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* noted that a single decision can constitute a "policy" where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-84. As plaintiffs allege that such a deliberate choice occurred in this case, we reject the defendants' municipal policy argument.

A.

As a preliminary matter, we must determine whether this issue is properly before us for review. Defendants argue that because the complaint filed against Bethel Park did not assert the claim that their property was unconstitutionally taken without just compensation, the plaintiffs can not raise this issue on appeal against the municipality. The defendants also assert that plaintiffs' counsel waived this issue against the individual defendants when he stated in a brief to the district court:

> Plaintiffs have not asserted a claim under the Just Compensation clause and do not assert that their property was taken from them by inverse condemnation. . . . There are no elements of a taking which would justify an eminent domain proceeding. No government entity took possession of the land. Neither in this case could Plaintiffs argue that there was any restrictive zoning laws or development regulations.

App. at 360-61.

Finally, defendants argue that plaintiffs waived this argument by filing a defective notice of appeal. They point out that this argument was only presented to the district court in the context of the plaintiffs' motion to vacate the district court's order of June 4, 1987, and that since the notice of appeal filed by the plaintiff refers only to that order, the plaintiffs have not appealed the district court's order of July 22, 1987, denying their motion to vacate.

The plaintiffs concede in their brief to this Court that they did not plead this claim against the defendant municipality of Bethel Park, and we will thus not consider the claim against that defendant. The plaintiffs, however,

insist that their unconstitutional taking claim against the individual defendants is properly before us. We agree.

Plaintiffs raised this issue in their complaint against the individual defendants, and the district judge considered the merits of this claim in the context of the plaintiffs' motion to vacate the district court's order granting summary judgment. Although the plaintiffs, in a brief to the district court stated that they had not raised such a claim, they now admit that "in drafting such brief [we] erroneously overlooked the Amended Complaint . . . which does plead such a claim." Appellants' Brief at 18. It is also significant that the brief at issue was filed prior to the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S.Ct. 2378 (1987), which expanded the ability of property owners to assert claims that their fifth amendment right to not have property taken without just compensation has been violated. We conclude that the plaintiffs did not waive this claim against the individual defendants.

We also find that the plaintiffs' notice of appeal was not defective. There is a "policy of liberal construction of notices of appeal . . . in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party." *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 357 n.4 (1984) (quoting parenthetically *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981)). In addition, an appeal of a grant of summary judgment invokes this Court's jurisdiction over the disposition of all claims in a complaint. *Murray v. Commercial Union Ins. Co. (Commercial)*, 782

F.2d 432, 434-35 (3d Cir. 1986). We thus conclude that the district judge's orders of June 4, 1987 and July 22,, 1987 are both properly before us.

B.

Turning to the merits of the plaintiffs' unconstitutional taking claim, it is clear that the plaintiffs have not and cannot make out a claim that their property was "taken" without just compensation. Although the Supreme Court in *First Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S.Ct. 2378 (1987), extended this doctrine to encompass actions seeking damages for a temporary taking, the Court held that a temporary taking is not different in kind from a permanent taking when the temporary taking denies a landowner *all use* of his property. *Id.* at 2388. The Court noted that it was not addressing the "quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . ." *Id.* at 2389.

As the plaintiffs here were merely denied a particular building permit, and retained the right to put their land to a variety of alternative uses, the actions of the defendants can not be said to have denied them all use of their property. Indeed, they have made no such allegation. We will affirm the district court's orders granting the defendants summary judgment on this claim, and denying the plaintiffs' motion to vacate the court's order of summary judgment.

V.

We will reverse the district court's order granting the defendants summary judgment on plaintiffs' claim

that they were denied their constitutional right to substantive due process, and will affirm the district court's dismissal of the remainder of the plaintiffs' claims. Each party to bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DINO BELLO, an individual and SIMMONS PARK PROPERTIES, INC., a corporation,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 80-1264
NORMAN L. WALKER, JOHN E. KANON, JAMES M. MARTIN, JOSEPH J. URBANOWICZ, HARRY E. BABINGER, JAMES E. HADSELL, YVONNE A. RIGATTI, GLENN TRAUTMAN, WILLIAM W. RUHL, WILLIAM G. DODDS, PATRICIA M. PRICE, CONCETTA SERDY, and REID W. McGIBBENY, individuals,	)	
Defendants.	)	

DINO BELLO, an individual, and SIMMONS PARK PROPERTIES, INC., a corporation,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 81-346
MUNICIPALITY OF BETHEL PARK,	)	
Defendant.	)	

MEMORANDUM ORDER

AND NOW, this 4th day of June, 1987, the magistrate having filed a report and recommendation suggesting that defendants' motion for summary judgment be granted, the plaintiffs having filed objections to that report, the defendants having responded to the objections, and the court having given the matter due consideration, IT IS ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted for the following reasons.

1) We have reviewed the plaintiffs' objections to the magistrate's report and believe that the plaintiffs merely reiterate arguments presented to, and properly rejected by, the magistrate. In particular, we believe that *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir. 1984), governs this case and, therefore, is dispositive of the plaintiffs' due process claim. Consequently, plaintiffs' reliance upon cases from other Circuits is misplaced.

2) In addition to the reasons given by the magistrate, we believe that the evidence does not establish the requisite intent for a due process claim. The uncontradicted evidence establishes that Walker denied issuance of the building permit based upon misinterpretation of the site plan. At best, Walker's actions constitute a negligent act, and therefore, do not amount to a deprivation of property cognizable under § 1983. *See Daniels v. Williams*, 474 U.S. —, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, 474 U.S. —, 88 L.Ed.2d 677 (1986).

3) We find no merit in plaintiffs' challenges to the magistrate's analysis of the equal protection claim.

4) Accordingly, for the reasons given in the report and recommendation of the magistrate along with

the reasons given herein, we will grant the defendants' motion for summary judgment.

/s/ Gustave Diamond
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DINO BELLO, an individual and SIMMONS PARK PROPERTY, INC., a corporation,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 80-1264
NORMAN L, WALKER, et al.,	)	
Defendants.	)	

DINO BELLO, an individual and SIMMONS PARK PROPERTY, INC., a corporation,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 81-346
MUNICIPALITY OF BETHEL PARK,	)	

MEMORANDUM ORDER

AND NOW, this 22nd day of July, 1987, the plaintiffs having filed a motion to vacate the order of summary judgment in light of the recent Supreme Court case of *First English Evangelical Lutheran Church of Glendale, California v. Los Angeles County,* 55 U.S.L.W. 478 (June 9, 1987), the defendants having responded to said motion, and the court having given the matter due consideration, IT IS ORDERED that plaintiffs' motion be, and the same

hereby is, denied for the reasons that *First English Evangelical Lutheran Church* is wholly inapposite to the case at bar and therefore, does not offer any basis for vacating our previous order.

/s/ Gustave Diamond
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DINO BELLO, an individual, and SIMMONS PARK PROPERTIES, INC., a corporation,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 80-1264
NORMAN L. WALKER, JOHN E. KANON, JAMES M. MARTIN, JOSEPH J. URBANOWICZ, HARRY E. BABINGER, JAMES E. HADSELL, YVONNE A. RIGATTI, GLENN TRAUTMAN, WILLIAM W. RUHL, WILLIAM G. DODDS, PATRICIA M. PRICE, CONCETTA SERDY, and REID W. McGIBBENY, individuals,	)	
Defendants	)	

DINO BELLO, an individual, and SIMMONS PARK PROPERTIES, INC., a corporation,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 81-346
MUNICIPALITY OF BETHEL PARK,	)	
Defendant	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that plaintiffs' motion for summary judgment be denied and that defendants' motion for summary judgment be granted.

II. REPORT

Plaintiffs bring these actions against defendants, the Municipality of Bethel Park and some of its officials, under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, alleging this court has jurisdiction under 28 U.S.C. Section 1343(3), and also under the Sherman Act, 15 U.S.C. Section 1, and the Clayton Act, 15 U.S.C. Section 15, seeking damages for alleged delay in issuing a building permit for plaintiffs' townhouse development in Bethel Park, Allegheny County, Pennsylvania. Both parties have filed motions for summary judgment.

Plaintiffs applied for a building permit on May 7, 1979, and when it was not granted they filed a complaint in mandamus before the Court of Common Pleas of Allegheny County, Pennsylvania, on June 8, 1979. On July 20, 1979, defendant Walker, the building inspector for Bethel Park, advised plaintiff Bello that the permit was denied because he was seeking to build units located in phase #5 of the Simmons Park Village Development and construction of the building in phase #5 was not in accordance with an approved site plan. Plaintiff Bello was advised that building permits could be issued in phase #2 (Exhibit 13 to plaintiffs' supplemental brief).

On July 19, 1979, plaintiffs filed an amended complaint in mandamus and an amended motion for peremp-

tory judgment. The case was referred to a referee who filed a tentative decision denying plaintiffs' motion for a peremptory judgment and finding that plaintiffs' right to a peremptory judgment and mandamus was not clear. The referee stated:

> In the instant case, the record is confusing and the plaintiffs' right to a peremptory judgment is far from clear. In fact, if the court were required to decide on the present record whether plaintiff should be granted a final judgment in mandamus, the court would rule against plaintiff . . .
>
> In short, it appears to the court that Walker's interpretation of the codes is correct and that plaintiffs' request to build in phase 5 before phase 2 should have been denied, at least until a revised site plan is approved.
>
> But even if Walker's interpretation of the codes is incorrect, Walker had no clear legal duty, based on the record as it presently stands, to construe the codes as not requiring building in accordance with the phases in the approved site plans. For this reason mandamus would be denied on the present record.

(Tentative decision of referee attached to "Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment").

On March 26, 1980, an order was entered by the Honorable Judge Watson, in the Court of Common Pleas of Allegheny County, Pennsylvania, granting plaintiffs' motion for peremptory judgment in mandamus to have building permits issued anywhere in phase II of the development. The building inspector was directed to issue any and all permits properly requested by plaintiffs in accordance with Judge Watson's opinion. Judge Watson

found that although the minutes of the planning commission meeting on August 18, 1976, revealed there had been a discussion of the development in five phases, the development had never been submitted or approved for a five phase development to either the planning commission or the municipal counsel. Instead, plaintiffs had been persuaded not to develop the project in separate parcels, but to develop it as a one lot subdivision and to adopt the condominium method of organization and ownership (order attached as Exhibit "A" to the complaint). However on January 23, 1981, Judge Watson entered another order vacating the opinion and order of March 26, 1980, and adopting the tentative decision of the court appointed referee. Subsequently, on May 5, 1981, the Honorable Nicholas A. Papadakos, another judge of the Court of Common Pleas of Allegheny County, Pennsylvania, directed the defendants, Bethel Park Municipal Council; the Municipality of Bethel Park; James M. Martin, Municipal Manager; Norman Walker, Code Enforcement Officer; and John E. Kanon, Planning Director, to issue the building permits sought by plaintiffs. The court stated:

> In this matter, there is no dispute that the municipal council approved a site plan. The only dispute is whether the grouping of units into five parcels described as "phases" binds the plaintiff to develop the units in the phases as numbered on the plan. This court can find no evidence besides the plan itself, which shows the numbered phases, to support defendants' position of sequential development, nor has any written agreement or understanding between the parties been brought to this court's attention supportive of defendants' position.
>
> This court, therefore, finds that the numbering of the five parcels as phases does not limit the plain-

> tiff to development of its lots in numerical order of phases (phase I, then phase II, then phase III, etc.). Rather, this court finds that the adoption by the municipal council of the entire site plan gives plaintiff the right to develop its units as it finds proper. Furthermore, once defendants approved the site plan, plaintiff had a clear right to the issuance of building permits for the units plaintiff desired to develop and defendants had no discretion in granting or denying such permits.

(Order and opinion attached to plaintiffs' affidavit filed March 11, 1983). On July 27, 1982, the Commonwealth court quashed defendants' appeal from Judge Papadakos' order *(Bethel Park, etc. v. Simmons Park Properties,* 448 A.2d 661 (Pa. Cmwlth. 1982) (copy attached to affidavit of plaintiff filed March 11, 1983).

In plaintiffs' supplemental brief they assert that, "Subsequent to the filing of the complaint, plaintiff Simmons Park Properties, Inc. did seek protection under the bankruptcy laws at No. 85-1304 Pittsburgh. Plaintiff will produce evidence that the 2½ year delay was the direct and proximate cause of the need for bankruptcy protection for Simmons Park Properties, Inc. from creditors." (p. 26). Plaintiffs also assert in their brief, "Plaintiff Dino Bello, through records and through his own testimony, will detail the amounts of money spent in order to comply with the requirements of approval for the development." (p. 27). Plaintiff Bello therefore appears to claim that he suffered damages as a result of the delay in obtaining the building permits. Unfortunately, counsel does not seem to understand that unverified statements contained in a brief cannot be considered on a motion for summary judgment. *Kauffman v. Johnston,* 454 F.2d 264 (3r Cir. 1972).

Plaintiffs' counsel's inability to clearly identify their legal claims and the factual basis for them has made disposition of the parties' pending motions for summary judgment extremely difficult. On October 11, 1984, the court ordered plaintiffs to file a response to defendants' motion for summary judgment and supporting brief within ten days. Subsequently, on August 25, 1985, an order was entered observing that the court had reviewed the briefs and ordering plaintiffs to submit a supplemental brief within fifteen days of the order. Plaintiffs were required to identify the evidence, if any, creating a question of fact as to the issues addressed by the brief. Subsequently, on January 17, 1986, the court ordered the Clerk of Court to refer this action to a magistrate for report and recommendation on the pending motions. Oral argument was scheduled for February 20, 1986. During oral argument it became clear that defendants' objections to plaintiffs' "Counteraffidavit", for its failure to comply with Rule 56 (e) of the Federal Rules of Civil Procedure because it contained conclusory allegations, conclusions of law, and failed to show that the affidavits made on personal knowledge, were valid. Therefore, plaintiffs subsequently sought and were granted leave to file another affidavit which was filed on April 15, 1986. After reviewing the briefs and other documents submitted in support of and in opposition to the motions for summary judgment, the magistrate entered a memorandum order on August 20, 1986, observing that plaintiffs' counsel still had failed to clearly articulate the legal basis for plaintiffs' claims. The magistrate concluded that plaintiffs appeared to be admitting that they were not deprived of procedural due process since there was a procedure to review a zoning

change, but they appeared to assert that they had been deprived of substantive due process. Since the parties' briefs had not clearly addressed the issues, the magistrate elected to give them an opportunity to do so. Therefore, plaintiffs were required to file a brief by September 12, 1986, setting forth the legal basis for their claims that they were denied equal protection in violation of the Fourteenth Amendment; that they were denied substantive due process in violation of the Fourteenth Amendment and that defendants violated Section 1 of the Sherman Act, 15 U.S.C. Section 1 and Section 4 of the Clayton Act, 15 U.S.C. Section 15. Defendants were ordered to file a responsive brief by October 6, 1986.

Plaintiffs' brief was finally received on October 9, 1986. At this late stage plaintiffs were still unwilling to clearly identify the basis for their claims, stating:

> [P]laintiffs do not make any statement with regard to procedural or substantive process.
>
> > Plaintiffs assert a deprivation of due process based upon the articulation of these concepts in the application of Section 1983 claims to land use cases. If it be necessary to characterize the type of deprivation of due process, it appears more correct to characterize it as a deprivation of procedural due process founded upon a baseless withholding of a building permit.

(Plaintiffs' brief received October 9, 1986, p. 5-6).) Plaintiffs only references to the facts are contained in plaintiffs' supplemental brief which was filed on October 18, 1985, and plaintiffs' affidavit which was filed on April 15, 1986. However, in those documents plaintiffs failed to relate the facts to the legal claims. Therefore it has been

necessary for the magistrate to attempt to determine the factual basis of each of plaintiffs claims.

Defendants have filed a motion for summary judgment and plaintiffs have filed a motion for partial summary judgment. In *Celotex Corp. v. Catrett,* — U.S. —, 54 L.W. 4775 (June 25, 1986), the Supreme Court held that a party is entitled to summary judgment where "The nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." 54 L.W. 4777. The Court stated "One of the principal purposes of the summary judgment is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." 54 L.W. 4777. The Court also noted that under Rule 56 a party may move for summary judgment "with or without supporting affidavits." In cases "where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" 54 L.W. 4777.

A. Due Process Claim

It is noted that plaintiffs still are unable to advise the court whether they claim a denial of substantive or procedural due process although they indicate it is more likely a procedural due process claim. However, they fail to articulate the basis for this claim. They do not claim that they did not have notice of defendant Walker's reasons for refusing to issue the building permit and it is noted that Exhibit 13 to plaintiffs' supplemental brief is a copy of a letter plaintiffs received from defendant Walk-

er, the building inspector, advising him that the building permit was being denied because it sought a building permit for units located in phase 5 which was not in accordance with the approved site plan. They were advised that building permits may be issued on phase 2. Although plaintiffs assert that Judge Papadakos ultimately determined that defendant Walker was wrong and that plaintiffs were not required to build in phases, plaintiffs make no claim that they were not advised of the reason for the denial. Further, plaintiffs make no claim that they did not have a fair opportunity to present the facts and their argument in support of their request for the building permit to defendants. Paragraph 25 of plaintiff Bello's affidavit which was filed on April 15, 1986, states:

> Beginning in 1975 when I applied for the rezoning of the property for the Simmons Park Development and continuing through all of the approvals in 1976 and 1977 and the building in 1978 of 47 units and the application for the additional permits in February of 1979, I was in constant contact with the members of the municipal council, John Kanon, James Martin, Normal [sic] Walker and Martin Marak. I had conversations with these people and attended all of the meetings that led up to and resulted in the approvals of the plan, the issuance of building permits and the enforcement of any regulations. I know what site plans were before them at the time of approval and was present at the meetings when the approvals were voted on.

Plaintiff Bello then makes conclusory allegations as to the defendants' knowledge with respect to the approval of plaintiffs' plan. However, he makes no claim that he was denied the opportunity to attend any meetings or discuss his plans with any defendant.

1. Discussion of the Facts

Plaintiffs assert that their primary opponent was defendant Yvonne A. Rigatti who opposed the townhouse developments in general prior to her election to municipal council of Bethel Park. Plaintiffs' supplemental brief asserts on page 20 that defendant Rigatti ran for council in the election of November of 1977. Their supplemental brief, page 19, avers that she took office as a member of council in January 1978. They submit documents revealing that she was opposed to multiple family dwellings in the area. Exhibit 21A attached to plaintiffs' brief[1] is a letter that defendant Rigatti wrote as a private citizen, objecting to townhouses, claiming that they would damage the residential character of the neighborhood, would worsen existing traffic problems and overcrowd the schools.[2] Plaintiffs have submitted minutes of a meeting on March 16, 1976, revealing that Mrs. Rigatti appeared and opposed plaintiff's rezoning request to transfer his property from R2 to R-T (Exhibit 24 to plaintiff's affidavit). (Plaintiffs have submitted copies of newspaper articles which shall not be considered since, in addition to the fact that they do not meet the requirements of Rule 56(e), they are not admissible evidence.) Plaintiffs also submit documents indicating that defendant Rigatti campaigned for election to counsel on the basis of her objections to further land

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[1]It is noted that the documents submitted as exhibits to plaintiffs' brief do not appear to be sworn or certified copies as required by Rule 56. However, defendants have not objected to them and therefore they will be considered.

[2]The Third Circuit has recognized that considerations such as these are proper for local zoning bodies. *Rogin v. Bensalem Tp.*, 616 F.2d 680, 688-689 (3d Cir. 1980).

development (Exhibits 28, 29, and the last page of Exhibit 33, to Plaintiffs' Supplemental Brief). However, the actions she took as a private citizen, prior to her election to council, would not be state action for purposes of liability under Section 1983.

Plaintiffs also submit evidence that after her election to council defendant Rigatti opposed their development. In paragraph 14 of plaintiff Bello's affidavit he avers that in the fall of 1979 defendant Ruhl, a Bethel Park councilman, told him that he was having problems because he had hired Ray Kirich. He told plaintiff that defendants Joe Urbanowicz, a councilman, and defendant Rigatti did not like Kirich and were going to "put pressure on people." Plaintiff also avers that defendant Norman Walker, code enforcement officer of Bethel Park, told him during a conversation in July of 1979 at Tony's Villa that defendants Rigatti and Urbanowicz did not like Ray Kirich and that he would have problems as long as he employed Kirich. In paragraph 14 of his affidavit plaintiff avers that he had a conversation with defendant Martin at the end of July of 1979 at Ernie's Esquire on Route 19 and defendant Martin told him that he was having problems because he had hired Kirich stating, "Well the counsel lady over there doesn't like it." Plaintiff avers that defendant Walker said, "Dino, I'm trying not to give you a hard time, I'm under pressure, I'm at the whim of five of their votes, at any time they can tell me whether I have a job or don't have a job, and I have no choice." In paragraph 22 of his affidavit (page 12) plaintiff Bello asserts that during defendant Rigatti's second campaign for counsel in April of 1981 she passed out newspaper excerpts wherein she circled her participation in fighting multiple family

housing and her support of her constituents on matters of zoning. The affidavit refers to Exhibit 25. The first page consists of copies of newspaper articles. The other document is apparently campaign literature circulated by defendant Rigatti in which she states, "I have supported my constituents on matters of zoning. EXAMPLE: Lemon Tree appeals, Danielson rezoning (Boxer Heights), group home appeals." It is noted that this document makes no reference to plaintiff's development but rather indicates that defendant Rigatti opposed other developments as well as Simmons Park. Submitted as Exhibit 28 to plaintiffs' supplemental brief is what plaintiff asserts is campaign literature by defendant Rigatti in which she cited as problems—continuous land development, overcrowded schools, heavily traveled and poorly maintained roads, inadequate storm drainage and lack of rapport with constituents. She noted that her opponent had cast the deciding vote for the Simmons Park Townhouse Development which was under construction at that time.

On page 20 of plaintiffs' supplemental brief they note that in his deposition defendant Kanon testified on pages 11-14 that after defendant Rigatti obtained a seat on council she arranged a site visit to plaintiffs' development. After the tour she made comments to Kanon that she did not like the development (Kanon dep. 14). He further testified that he recalled defendant Rigatti making public statements in opposition to the Simmons Park Development. In general, she opposed all multi-family development and presented a petition against it (Kanon dep. 15). Plaintiff notes that defendant Walker, in his deposition, also testified that he presumed defendant Rigatti had re-

quested the tour and that she made a derogatory comment about the color of the siding during the tour (Walker dep. 15-16). During her deposition defendant Rigatti admitted that she signed a petition opposing rezoning of plaintiff's property and got one other person to sign. (Rigatti dep. 6-9). She also admitted she contributed approximately $30 to the lawsuit to appeal the rezoning (Rigatti dep. 12).

Plaintiff avers that Exhibit 29 attached to plaintiffs' supplemental brief is political literature voicing opposition to plaintiffs' development which was drafted at a meeting attended by defendant Rigatti and sent by her neighbor who lives across the street from her, Gwen Auel, who was her political ally and was running for committeeman. During Rigatti's deposition she testified that Auel lived across the street from her and that she was at Auel's house when the document was discussed although she did not write it. (Rigatti, dep. 28-29). During her deposition Rigatti acknowledged that the vote of her opponent in favor of the Simmons Park Development was a campaign issue for her (Rigatti dep. 35).

While plaintiffs have shown that defendant Rigatti was strongly opposed to theirs and other multiple family developments on the ground they would have an adverse effect on the community, they have not shown specifically that she played any role in the denial of the building permits. The sole statement in paragraph 14 of the Bello affidavit that defendant Walker told him that Rigatti did not like Ray Kirich and that he (Walker) was under pressure is not sufficient to establish that defendant Rigatti caused plaintiffs to be denied their building permits. Further, plaintiffs' evidence that there were occasions

when council voted on building permits (Exhibits 1, 2, 3) would not establish that any of the municipal council defendants caused the denial of plaintiffs' building permits. The affidavit of defendant Norman Walker avers that he denied plaintiffs' building permits based on his understanding that ordered phasing was a condition of the approved site plan and that issuance of the required permits wonuld contravene the site plan and violate applicable zoning laws. He avers that the decision to withhold the permits was not made pursuant to any agreement between himself and any defendant or any other person and that it was made solely by him without suggestions, threats, coercion or intervention by defendants or any other person. Exhibit 2 to plaintiff Bello's affidavit is a memo from defendant Martin, the manager, to members of council advising them of a change in item 9 of the April 9, 1979, council meeting minutes. The memo reveals that the application for issuance of building permits by Simmons Park Village had been granted subject to the stipulation that the structure and all other structures remain at least fifteen feet away from any abutting single family areas. The memo notes that defendant Rigatti seconded the motion for issuance of a building permit.

While plaintiffs have produced evidence that defendant Rigatti was strongly opposed to their development as well as others and that she and defendant Urbanowicz did not like plaintiffs' employee Ray Kirich, they have failed to offer any evidence which controverts defendant Walker's affidavit that the decision to withhold the permits was made solely by him without suggestions, threats, coercion or intervention by any of the defendants or any other person. Plaintiff Bello submits as Exhibit

7 to his affidavit a memo from defendants Kanon and Walker and a Martin Marek to the municipal council dated April 4, 1979, recommending that plaintiff's application to modify his townhouse development be denied. This memo is dated prior to plaintiff's May 7, 1979, application for building permits which is the basis of this action. In paragraph 13 on page 7 of his affidavit (there is also a paragraph 13 on page 6 of the affidavit) plaintiff Bello asserts that in July of 1979 defendant Walker told him that Rigatti and Urbanowicz did not like Kirich and that as long as he employed Kirich he was going to have problems. This general statement would not appear to be sufficient to establish that defendants Rigatti and Kirich had any critical role in the denial of the building permits.

Plaintiffs assert that during her testimony at a mandamus hearing on July 11, 1979, defendant Patricia M. Price testified that it was not just Mr. Walker who was turning down the permits but that everybody on council needed more answers. A portion of her testimony is submitted as Exhibit 10 to plaintiff Bello's affidavit and it shows that no disposition was taken of plaintiff's request for building permits because of confusion. Defendant Walker had reported that he would not issue the building permits yet. She further testified that questions were raised as to whether plaintiffs were seeking rephasing or whether it would be a one lot subdivision. This testimony would appear to establish that council at that time approved of defendant Walker's decision not to issue the building permits until further information was obtained.

Submitted as Exhibit 31 to plaintiff Bello's affidavit is a memo to members of council from an unidentified in-

dividual indicating that it was the concensus of council that plaintiffs should comply with Section 61.15—"Site Plans, of the Zoning Ordinance, or he can continue with the original application." This is an extremely ambiguous statement. It is noted that by this time defendant Walker had denied plaintiffs' application for a building permit and plaintiffs had filed their complaint in mandamus before the Court of Common Pleas of Allengheny County, Pennsylvania.

In their supplemental brief, page 8, plaintiffs assert that during his testimony before the Court of Common Pleas on July 11, 1979, defendant Walker testified that he brought the matter of the permits to council and discussed the permits with planning director John Kanon (p. 7-8 of plaintiffs' supplemental brief). Review of that testimony reveals that Walker testified (p. 159) that he made a brief presentation to council but that council did not individually or collectively express an opinion to him as to whether the permit should be issued (p. 151) and that although he had discussed the matter with Mr. Kanon, Mr. Kanon had not given him advice as to whether the permit should be issued. Plaintiffs' brief then refers to the testimony of defendant Urbanowicz of July 11, 1979, asserting that he testified that defendant Kanon explained the entire matter to the full council. A copy of that testimony is submitted as Exhibit 4 to plaintiffs' supplemental brief. That testimony indicates that Kanon brought something to the attention of council, but it is not clear what.

Submitted as Exhibit 5 to plaintiffs' supplemental brief is the deposition testimony of defendant Concetta Serdy taken on July 11, 1979, in which she testified that

council had a committee which dealt with building permits. That committee consisted of the entire counsel. Plaintiffs submitted as Exhibit "D" to plaintiffs' counter-affidavit, the testimony of defendant James E. Hadsell, a member of council, in which he testified that defendant Walker had advised council of what he considered to be the problems which would precipitate his failing to issue building permits. He believed that members of council might have expressed their personal opinion there was cause for denial of a permit but that they would leave that decision to defendant Walker. (Also attached as Exhibit 6 to plaintiffs' supplemental brief.) Plaintiffs also submit the testimony of defendant Price as Exhibit 7 to plaintiff's supplemental brief in which he testified there was a general discussion in which defendant Walker brought members of council up-to-date on the situation. He did not recall that any member of council voiced an opinion that the permit should not be granted under the circumstances. Plaintiffs note that defendant Walker testified in his deposition at pages 6 and 7 that his office was twenty feet from defendant Kanon's office, that they had occasion to work together, and that they consulted each other on zoning ordinance interpretations and interpretation of site plans in connection with code enforcement (p. 8 of plaintiffs' supplemental brief). Plaintiffs argue that the existence of the mandamus action brought the entire matter of the building permits to the attention of council. However, they still have offered no evidence that the members of council denied the building permits.

As to bias of defendant Walker, plaintiff Bello asserts in paragraph 21 of his affidavit that defendant

Walker showed favortism to plaintiff's competitor Brush Run, by failing to enforce Section G(1) of the PURD Ordinance which is attached to the affidavit as Exhibit 20. However, plaintiff admits that Walker testified in his deposition that he did not enforce the ordinance against Brush Run because it had been repealed. In paragraph 26 of his affidavit plaintiff avers that, "[T]he code enforcement officer, Walker, caused to be removed the Simmons Park directional signs within the municipality, but at the same time, permitted directional signs from other builders to remain on the same utility poles from which the Simmons Park signs were removed. I personally saw municipal employees removing Simmons Park directional signs and leaving the directional signs of Ryan homes and Washington homes on the same utility poles." Although plaintiff states that he saw municipal employees removing plaintiff's signs, he fails to reveal the basis for his conclusion that they were acting pursuant to the directions of defendant Walker. Therefore. this statement does not comply with the requirement of Rule 56(e) that an affidavit be based upon personal knowledge.

2. Discussion of the Law

In *Rogin v. Bensalem Tp.*. 616 F.2d 680 (3d Cir. 1980), the court held that the Pennsylvania procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court. 616 F.2d 695. Therefore, the district court had properly dismissed a claim by a real estate developer who had been denied building permits because, after approval of the plans by the board of supervisors of the township and after construction of 106 of the planned 557

condominium units had been started, the zoning ordinance had been amended to reduce the allowable density from twelve to ten units per acre. The ordinance was again amended to reduce the density to four units per acre, resulting in limiting the developer to two hundred units after original approval of 557 units. The developer appealed the decision of the zoning hearing board to the Court of Common Pleas seeking a writ of mandamus. The Court of Common Pleas reversed the zoning hearing board's decision and ordered that the permits be issued because the project was "substantially undertaken." The Court of Common Pleas stayed its decision pending appeal by the zoning board to the Commonwealth court which had not yet rendered its decision at the time of the Third Circuit's decision. Therefore, at that time the zoning officer had not yet issued any permits. The court noted that the developer alleged that the defendants had conspired to violate its substantive constitutional rights and that the supervisors had announced publicly that they would take all steps necessary to stop the construction of Bensalem Village and similar real estate developments. The court recognized that limiting population and density were valid zoning considerations. In that case the supervisor's objections to the development were similar to those of defendant Rigatti in this case. The court held that the developer had failed to state a procedural due process claim in regard to the actions of the zoning officer and the zoning hearing board in refusing to issue the building permits. The court noted that a developer has due process rights in the procedure utilized by a municipality to issue building permits. However, the developer had failed to set forth any behavioral or structural allegations

from which it could be inferred that the township's process was unconstitutional. The court then considered the system enacted by the Pennsylvania legislature for processing challenges to zoning ordinances and found that it substantially conformed with the general due process guidelines enunciated by the Supreme Court. The court noted that the Court of Common Pleas had granted the developer the relief it requested. Although the developer made a general allegation of denial of due process, it had made no specific allegations of deficiency in the process. Therefore, the court concluded that the district court had properly held that the developer failed to state a colorable procedural due process claim. That case is relevant here in that the Court of Common Pleas of Allegheny County ultimately ordered that plaintiffs were entitled to new building permits. Plaintiffs here are actually complaining of the time it took for the state system to dispose of their action. However, the time period for disposition by the state courts would not create a Section 1983 claim against municipal officials. The Third Circuit found that the state system satisfies due process requirements and plaintiffs have not alleged any abuse of the state system by the defendants.

In *Cohen v. City of Philadelphia,* 736 F.2d 81 (3d Cir. 1984), the court held that the district court had properly granted summary judgment for the defendants where the plaintiff asserted that dismissal of a Philadelphia police officer and then the refusal to award him backpay after he was reinstated deprived him of due process in violation of the Fourteenth Amendment to the United States Constitution. The plaintiff was discharged after evidence was received that he had participated in a burglary. He

was acquitted of the criminal charges and then appealed his discharge to the Civil Service Commission which found there was insufficient evidence to implicate him in criminal activity but determined that he had violated a police department directive and ordered his reinstatement but held that it should be without backpay. Although the plaintiff could then have petitioned for rehearing before the Civil Service Commission and appealed any decision of the Commission to the Court of Common Pleas, he elected not to do so but instead brought an action in federal court pursuant to Section 1983, asserting that he had been deprived of property without due process of law. The district court had granted the defendants' motion for summary judgment based upon *Parratt v. Taylor,* 451 U.S. 527 (1981), which held that when an individual is deprived of property as a result of a random and unauthorized act by a state employee, if the state provides an adequate post-deprivation remedy, the individual has no Section 1983 claim for deprivation of due process. The court found that the failure to award the plaintiff backpay was the result of an error of the Commission. However, in showing that the Commission erred the plaintiff had shown no more than an unauthorized failure of state agents to follow prescribed procedures. Under *Parratt* those errors would not deprive the plaintiff of due process as long as the state provided him with the means by which to receive redress for the deprivation. The Commonwealth of Pennsylvania had provided for judicial review of the Commission's actions. The court stated:

> We thus join the First and Seventh Circuits in holding that substantive mistakes by administrative bodies in applying local ordinances do not create a

federal claim so long as correction is available by the state's judiciary. Any other holding would lead to the danger that:

> any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings.

736 F.2d 86. The court concluded that since Pennsylvania had provided a means to correct the errors which would sometimes occur at the administrative level, no deprivation without due process of law had occurred. In response to the plaintiff's claim that he was being required to exhaust state court remedies the court replied that it was not discussing exhaustion. It was merely holding that the state had provided the plaintiff with due process by providing, "reasonable remedies to rectify a legal error by a local administrative body." The court concluded:

> In this case, the contention is that a state agency erred in its adjudication of plaintiff's claim against the state. There is no claim that the plaintiff did not have recourse to the state courts, that the agency was acting according to a state policy in denying plaintiff's claim, or that the state proceeding was constitutionally defective or insufficient. At least under these circumstances, we believe that *Parratt* bars this suit.

In *Cohen* the plaintiff was discharged from his job without a hearing upon being charged with a criminal of-

fense, and, after he was acquitted he was reinstated but was denied backpay. In this case, on the other hand, plaintiffs' application for building permits was denied. At that time state law provided them with two options. First, they could have appealed the decision of the zoning officer to the zoning hearing board pursuant to 53 Pa. Stat. Section 10615 and 10909 and had a hearing pursuant to Section 10908. However, they took the alternative action available through 53 Pa. Stat. Section 10909 and Rule 1091 of the Pennsylvania Rules of Civil Procedure and brought an action in mandamus in the Court of Common Pleas. They did ultimately get the relief they sought in that Judge Papadakos directed the defendants to issue the building permits. Plaintiff Bello asserts that by the time the court proceedings were terminated, he was unable to proceed with construction because he was required to file for bankruptcy. However, the delay was due to the court proceedings rather than any action of the defendants. The defendants would not be personally liable for the time required for disposition by the state courts.

In *Stana v. School District of City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985), the court somewhat limited *Cohen, supra*, in holding that if a government entity could have but did not provide predeprivation procedures, a Section 1983 action complaining of the lack of procedural due process may be maintained in federal court, not withstanding the availability of state judicial routes. In that case, the plaintiff, a school teacher, had been removed from the eligibility list without notice to her. The court found that under the facts of that case a pretermination hearing was neither impractical or impossible. The court held that where the acts complained of are those of an

official in a supervisory position acting within the scope of his authority, a government entity can provide some pre-deprivation process. It is noted that in this case plaintiffs did not have property taken from them which they then attempted to reclaim through post-deprivation procedures. Rather, their application for a building permit was denied. The state system provided two avenues for them to appeal. Again, it is noted that plaintiffs have alleged no defect in the state system. In fact, they obtained the relief they sought—an order directing that they receive the building permits they sought.

In *Berlanti v. Bodman,* 780 F.2d 296 (3d Cir. 1985), the court held that a district court had erred in granting a motion for summary judgment for the defendants based on *Parratt v. Taylor, supra,* where the plaintiff alleged that he was debarred from bidding for public works contracts in New Jersey without adequate notice, hearing or appropriate enabling legislation. In that case the court held that where the state officials who debarred the plaintiff were highly placed, responsible supervisory officials, *Parratt,* which applied to random and unauthorized acts by lower officials such as prison guards, was not applicable. The court stated:

> [W]e conclude that in this case the availability of post-deprivation remedies is irrelevant. As we held in *Stana,* "if the government entity could have, but did not, provide predeprivation procedures, a § 1983 action complaining of the lack of procedural due process may be maintained in federal court, not withstanding the availability of state judicial routes as well."

780 F.2d 301. That case is not relevant here since plaintiffs make no challenge to the state system which did pro-

vide a pre-deprivation hearing and through it they did obtain an order directing they receive the building permits they were seeking.

In *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822 (1st Cir. 1982), the court held that the district court had properly granted the defendant's motion for summary judgment where the plaintiffs alleged they had been deprived of due process by officials who rejected their proposed residential housing development. The plaintiffs originally filed an action in state court which they ultimately withdrew. In their federal action under Section 1983 they claimed they were entitled to approval upon filing of their plan which complied with reasonable regulations and bylaws. They complained that their plan had been disapproved for improper reasons—the officials' fear of its social effects on the community and the political threat of a homeowners association. The court found that the plaintiffs had failed to allege a constitutional violation, even assuming they could have shown at trial that the town engaged in adversarial and even arbitrary tactics with respect to the plan. The court was willing to assume that the planning board was seeking to frustrate the plaintiffs' efforts to develop its subdivision. Still, the court found that plaintiffs had failed to allege a constitutional violation. They had failed to show they were denied a fair and meaningful hearing process. They were allowed a full public hearing on the plan. The board met with the plaintiff frequently and each official action by the board was accompanied by a full statement of reasons. It appeared that additional judicial review in the state courts would have been available to the plaintiffs if they

had so elected. Therefore, the plaintiffs had failed to allege a violation of procedural due process.

In *Creative Environments* the plaintiffs argued that they were deprived of due process by the town's alleged arbitrary misapplication of state law, which resulted in denying them their right to conduct a legitimate business and make a profit. The court stated:

> It is not impossible to derive a theoretical basis for CEI's argument from cases such as *Monroe v. Pape* . . . and *Perry v. Sindermann,* . . . But were such a theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.

680 F.2d 831. The court added in a footnote:

> Where a state has provided reasonable remedies to rectify a legal error by a local administrative body (and CEI raises no challenge in this case to the constitutionality of the state subdivision scheme itself), current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum . . . ("[T]he existence of an adequate state remedy to redress property damage inflicted by state officials avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.")

> A different situation may be presented in some instances, particularly in the realm of equal protection, involving gross abuse of power, invidious discrimination, or fundamentally unfair procedures . . . But the ordinary state administrative proceeding involving land use or zoning does not present such a situation, regardless of how disappointed the license or privilege seeker may feel at being initially turned down. Thus, where—as here—the state has erected a complex statutory scheme and provided for avenues of appeal to the state courts, property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes.

680 F.2d 832, n. 9. In discussing plaintiffs' claim that they were deprived of due process when the planning board openly interpreted state subdivision laws and a state court decision in ways which frustrated their large-scale housing development in order to protect what it viewed as the town's basic character, the court stated:

> Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of CEI's characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute—at least when not tainted with fundamental procedural irregularity, racial animus, or the like—which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate. A federal court, after all, "should not . . . sit as a a zoning board of appeals."

680 F.2d 833. The Court's concern in *Creative Environments* that zoning disputes could turn the federal courts into zoning boards of appeals seems particularly apt in this case. Plaintiffs have produced no evidence of fundamental procedural irregularity, racial animus or other serious constitutional violations. Their proof depends primarily upon alleged motives of a few of the defendants. In objecting to multi-family developments in general, defendant Rigatti was showing concern for factors which are properly considered in zoning matters, such as overcrowding and heavy traffic. See *Rogin, supra,* at 688. See also *Pace Resources, Inc. v. Shrewsbury Twp.,* 808 F.2d 1023, 1026 (3d Cir. 1987).

In *Cloutier v. Town of Epping,* 714 F.2d 1184 (1st Cir. 1983), the district court had properly dismissed a complaint alleging that the plaintiffs were deprived of due process by the defendants' revocation of a sewage connection permit, denial of other permits, and engaging in a pattern of harassment aimed at retarding or destroying plaintiffs' development plans. The plaintiffs claimed that the defendants engaged in a number of malicious delaying tactics which impeded their ability to proceed with their development. They claimed that the defendants deprived them of their property without due process by adding years of delay and extra costs. The court noted that a violation of a state statute does not automatically give rise to a violation of the Constitution. It also noted that the plaintiffs' long list of harassing actions revealed not the type of egregious behavior that might violate the due process clause, but rather, for the most part, disputes over the interpretation of the state and town zoning laws. As to the plaintiffs' claim that they had been deprived of procedural due process by revocation of the original sewer permit

without first being afforded a hearing, the court replied that "full judicial type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits." The court noted that the plaintiffs had received written notification of the revocation and had been invited to discuss the situation with the commission at its next meeting. There were also indications in the record that they and their attorney did at some later time discuss the matter with the commission. It is noted that in this case plaintiff Bello admits that he had many meetings with the defendants and makes no claim that he did not have adequate opportunity to present facts or argue his position to them.

In *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1983), the court made a comment which appears to be appropriate to this case.

> Chiplin asserts that as it had met all legal requirements for the permit, the town had no valid reason to reject the application. *It then aims in the general direction of the federal Constitution with buckshot,* stating that this improper denial of a permit "unlawfully restricted and interfered with plaintiff's use and enjoyment of its property," "interfered with plaintiff's prospective economic gain," denied it the equal opportunity of the law, and took its property without due processor [sic] just compensation. As described in its brief to us, the "gravamen of plaintiff's complaint is that the individuals named as defendants denied the plaintiff due process by maliciously denying it a building permit for invalid and illegal reasons and in bad faith." (Emphasis added).

712 F.2d 1526. In that case the court held that the district court had properly dismissed a complaint alleging that the plaintiff had been denied due process as a result of a five

year delay in obtaining a building permit. The plaintiff argued that because it had met all legal requirements for the permit, the town had no valid reason to reject the application. The court stated:

> [P]roperty is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes.

712 F.2d 1527. The court added, "The claim that denial of the permit was improperly motivated, unsupported by an allegation of the deprivation of the specific constitutional right, simply raises a matter of local concern, properly and fully reviewable in the state courts." 712 F.2d at 1527. The court also stated:

> A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error. Absent the allegation of a constitutional violation, no claim has been stated under section 1983.

712 F.2d 1528. See also, *Quinn v. Bryson,* 739 F.2d 8 (1st Cir. 1984) (delay in obtaining land use permits caused by disputes with local officials).

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983), cited by plaintiff, would appear to be contrary to the Third Circuit decisions of *Rogin v. Bensalem Tp., supra,* and *Cohen v. City of Philadelphia, supra,* and the above decisions of the Court of Appeals of the First Circuit. Apparently the Fourth Circuit is more willing than the First and Third Circuits to rehear local zoning matters.

Plaintiffs also cite *Three Rivers Cable Vision v. City of Pittsburgh*, 502 F. Supp 1118 (W.D. Pa. 1980). However, *Three Rivers* is distinguishable in several respects. In that case the plaintiffs claimed they were deprived of due process and equal protection during the bid procurement and the award process of a cable television contract. They claimed that one of the defendants had been awarded the contract despite material deficiencies in its bid as a result of a preconceived and unlawful preference. First, that case involved bidding for a municipal contract rather than application of a state zoning law. Further, there was no showing in that case that the state had established an administrative procedure to regulate the bidding process, including the right to a hearing, as Pennsylvania has established in zoning matters and which procedure was found to satisfy due process by the Third Circuit in *Rogin, supra.* In addition, there was no showing in that case that the plaintiffs had eventually obtained from the state courts the relief they sought. As has been noted above, the time for disposition by the state courts of plaintiffs' mandamus action would not be attributable to defendants and that is the only injury alleged by plaintiffs.

B. Plaintiffs' Equal Protection Claim

Plaintiffs last brief which was filed on October 9, 1986, asserts, "Plaintiffs theory of denial of equal protection is not based on any allegation of racial or class-based discrimination which is the more usual equal protection theory. Rather, plaintiffs assert that the adverse treatment they received as permit applicants was due to illegitimate, political, or at least personal motives which constituted a purposeful discrimination against a particu-

lar individual violative of the Equal Protection Clause of the Fourteenth Amendment." As the discussion of the facts under plaintiffs' due process claim reveal, plaintiffs' evidence is directed primarily toward allegedly improper motives of defendant Rigatti. However, her objections to multiple family dwellings because of overcrowding, traffic problems, etc., were legitimate concerns. Further, plaintiffs have failed to produce any evidence that defendant Rigatti caused the denial of their application for building permits. The affidavit of defendant Norman Walker avers that he denied plaintiffs' building permits based on his understanding that ordered phasing was a condition of the approved site plan and that issuance of the required permits would contravene the site plan and violate applicable zoning laws. He avers that the decision to withhold the permits was not made pursuant to any agreement between himself and any defendant or any other person and that it was made solely by him without suggestions, threats, coercion or intervention by defendants or any other person. Plaintiffs' general evidence that there were occasions when counsel voted on building permits (Exhibits 1, 2, 3) would not establish that any of the defendants, other than defendant Walker, caused the denial of plaintiffs' building permits although there is evidence that they did approve an application for building permits during a meeting on April 9, 1979. Exhibit 2 to plaintiff Bello's affidavit is a memo from defendant Martin, the manager, to members of council advising them of a change in item 9 of the April 9, 1979, council meeting minutes. The memo reveals that the application for issuance of building permits by Simmons Park Village had been granted subject to the stipulation that the structure and

all other structures remain at least fifteen feet away from any abutting single family areas. The memo notes that defendant Rigatti seconded the motion for issuance of a building permit.

Plaintiffs' equal protection claim was not included in their original complaint but was included in their amended complaint which was filed on November 26, 1980. New Count II alleges a conspiracy to deprive plaintiffs of constitutional rights under color of state law in violation of 42 U.S.C. Section 1983. In paragraph eight of that count plaintiffs make a general allegation that they were denied equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. However, the facts supporting that claim appear to be included in Count III of the amended complaint which alleges an "agreement, combination and/or conspiracy and restraint of trade in violation of 15 U.S.C. Section 1." In paragraph 12 of the complaint plaintiffs allege that defendant Kanon had a pecuniary interest in other land development in Bethel Park within the housing area of plaintiffs' proposed developments and that in those developments sidewalks were waived at the recommendation of defendant Kanon in his position as planning director of Bethel Park. Plaintiffs make no reference in their supplemental brief which was filed on October 9, 1986, or plaintiff Bello's affidavit which was filed on April 15, 1986, to any evidence in support of their allegation that defendant Kanon had a pecuniary interest in other land development. Therefore, they appear to have elected not to proceed on that allegation.

Plaintiffs assert that defendant Walker waived the building code requirements for the Brush Run townhouse

development, plaintiffs' competitor, while such requirements were enforced against them. First, plaintiffs complain that defendant Walker drafted an ordinance "Planned Unit Residential Development Ordinance" and that under the original draft which contained a minimum land requirement of thirty contiguous acres, plaintiffs, with thirty-three contiguous acres, would qualify and coud be developed without the necessity of a condominium arrangement which plaintiffs assert would be more cumbersome, and more difficult to market and administer. Plaintiffs' brief asserts that plaintiff Bello would testify to this. It is noted that on a motion for summary judgment, unverified statements contained in a brief cannot be considered. *Kauffman v. Johnston,* 454 F.2d 264 (3d Cir. 1972). In their brief plaintiffs assert that defendant Kanon redrafted the ordinance and changed the minimum acreage from thirty to thirty-five contiguous acres and that the ordinance was passed in this amended form. Plaintiffs assert that under the ordinance as amended, they could not develop under it while Brush Run, with forty-nine acres, could. In their supplemental brief, page 32, plaintiffs refer to testimony of defendant Kanon in his deposition at pages 22-24 in which he admitted that he made several drafts of the PURD Ordinance, that one of the original drafts required fifty acres, that it was changed, that Brush Run has forty-nine acres and that Simmons Park has thirty-three acres. However, there is no evidence in the record of any benefits Brush Run enjoyed as a result of being able to develop pursuant to the ordinance.

Plaintiffs also assert in their brief that the ordinance "Exhibit 36 to Plaintiffs' Supplemental Brief" required a full ownership interest in the land to develop as a PURD.

Plaintiff had such full ownership interest but James Corace had only an option for the Brush Run development. The ordinance as passed, Exhibit 37, provides that the applicant need only have a valid option on the land. In his deposition testimony, page 22, defendant Kanon testified that he did not recall the change in the draft of the PURD Ordinance from thirty acres to thirty-five acres. One of his original drafts had proposed fifty acres. He testified that since Simmons Park was approved prior to the adoption of the ordinance, the ordinance was not relevant to the development of Simmons Park (p. 24). Plaintiffs have offered no admissible contrary evidence or any evidence that they were injured by the ordinance. Further, the issue would appear to be whether the municipality had a legitimate reason for adopting the ordinance. See *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023 (3d Cir. 1987). Plaintiffs also have offered no evidence as to how they were injured by the provision in the ordinance providing that an applicant need only have a valid option on land.

Plaintiffs next complain that defendant Kanon required them to "help solve the Brush Run water problem" (plaintiffs' supplemental brief, p. 33). In paragraph 18 their complaint, discussed on page 23 of their supplemental brief, plaintiffs allege that defendants Walker, Kanon and Martin were under pressure from "the elected council persons" to find a way to halt plaintiffs' project. In paragraph 19 of the complaint discussed on page 24 of the supplemental brief, plaintiffs allege that defendant Kanon told plaintiffs this matter could easily be "corrected" by applying to the municipal council for "rephasing of the development." In their brief plaintiffs aver that the discussion

between plaintiff Bello and Kanon would be supported by plaintiff Bello's testimony. However, it is again noted that proffers of testimony cannot be considered on a motion for summary judgment.

In his affidavit plaintiff Bello states that sometime after February 1979 he met with defendant Kanon who suggested that he reapply for rephasing in his development. Plaintiff refers to Exhibit 32 to the exhibits to his supplemental brief which is a memo from defendant Kanon to municipal council and others dated May 2, 1979, suggesting that plaintiffs' rephasing be allowed as submitted provided that plaintiff Bello and his engineer participate in discussions with the municipal engineer for the express purpose of finding solutions to drainage problems along Brush Run Road (Exhibit 32 to plaintiffs' supplemental brief). Plaintiffs withdrew their application for rephasing (paragraph 24 of the complaint).

In their supplemental brief, page 33, plaintiffs assert that the ordinance that was passed, Exhibit 37 to the supplemental brief, requires inspections by the building inspector every six months to make certain that construction is in conformity with the applicable ordinances, paragraph G, #1 on the second page of Exhibit 37. Plaintiffs aver that in his deposition, pages 46 through 48 defendant Kanon testified that Brush Run did not submit to six month inspections and that part of the ordinance was not enforced against Brush Run. However, it is again noted that page 4 of defendants' Reply Brief Pursuant to Order dated April 20, 1986, notes that the deposition testimony attached to plaintiffs' affidavit establishes that the ordinance had been repealed. Defendant Walker testified in his deposition that he and others were inspecting Brush

Run during early 1979 (Tr. 20). However, he testified that after the ordinance was repealed it was not enforced as to either Simmons Park or Brush Run (page 21). He denied there was any period of time when Simmons Park was required to comply with the ordinance and Brush Run was not (Tr. 22). During his deposition, pages 35-36, Walker testified that he did not enforce the inspection requirements of the ordinance against Brush Run after the ordinance had been repealed. Plaintiffs have produced no evidence of any specific period of time when the ordinance was enforced against them but not against Brush Run.

In their supplemental brief, page 33, plaintiffs complain that the ordinance requiring a four inch step from the cellar floor to the garage door was not enforced against Brush Run although it was enforced against Simmons Park, referring to pages 20 to 25 of the deposition of defendant Walker. However, Mr. Walker explained that the ordinance was in effect when plaintiff commenced construction but by the time Brush Run commenced construction the ordinance had been repealed and neither Simmons Park nor Brush Run was required to follow it after repeal (p. 21-22). Plaintiffs have produced no contrary evidence.

In their supplemental brief plaintiffs assert that Brush Run spaced studs on two foot centers while Simmons Park spaced studs on sixteen inch centers, referring to page 26 of defendant Walker's deposition. They admit that defendant Walker testified that this was of each parties' own choice. In their brief plaintiffs state, "Although Walker states that this was their own choice, Dino Bello and Raymond Kirich will testify that Walker re-

quired Simmons Park to build with sixteen inch centers while permitting Brush Run to build on two foot centers. This made construction considerably cheaper for Brush Run and put them in a better competitive situation." As has already been noted, offers of proof cannot be considered on a motion for summary judgment. Plaintiff Bello's affidavit which was filed on April 15, 1986, made no reference to this requirement.

In their brief plaintiffs assert that in his deposition defendant Kanon acknowledged having social lunches with Jim Corace, the developer of Brush Run, and that he visited Corace as a social guest in his apartment. This does not establish a denial of equal protection under the Fourteenth Amendment.

Plaintiffs assert in their brief that the cutoff of building permits to Simmons Park left Brush Run with no competition in the area for two and a half years. They assert that Brush Run took advantage of this and advertised that it had the only available townhouses in the area. A copy of an ad by Brush Run is submitted as Exhibit 38 to plaintiffs' supplemental brief. This does not establish that plaintiffs were deprived of equal protection.

Paragraph 27 of plaintiff Bello's affidavit avers that "municipal officials" failed to grant any of the 216 sewer taps allocated in 1985 by the Watershed Authority to Bethel Park to Simmons Park Development even though such taps were continually requested by Simmons Park. The affidavit asserts that the "municipal officials" failed to respond to the requests for sewer taps and failed to respond to the inquiry as to why no taps were allocated to Simmons Park. The affidavit states that copies of the correspondence are attached to the exhibit as Exhibit 32.

That exhibit includes letters from plaintiff to Matthew J. Krider, Municipal Manager of Bethel Park, who is not a party to this action.

In matters of zoning great deference is to be accorded to legislative decisions establishing classifications. *Rogin v. Bensalem Tp., supra,* at 687. The court explained the reason for this deference as follows:

> [T]he process of democratic political decisionmaking often entails the accommodation of competing interests, and thus necessarily produces laws that burden some groups and not others. In the absence of special justification for more searching judicial examination—such as an allegation that the legislative body has classified on the basis of a suspect characteristic —for a court to undo the fruits of this process would be "to condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system."
>
> To prevail on its equal protection claim, Mark-Garner must persuade us that the passage and application to it of the zoning amendments "so lack rationality that they constitute a constitutionally impermissible denial of equal proection."

616 F.2d at 687-688. The court then stated:

> Although zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare," it is well-settled that such measures are constitutional if they bear a "substantial relation to the public health, safety morals, or general welfare." . . . The concept of general welfare has been broadly construed: "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

616 F.2d at 688. The court added:

> A quiet pace where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

616 F.2d at 688.

In *Cook v. City of Price, Carbon Cty., Utah,* 566 F.2d 699 (10th Cir. 1977), the court held that the trial court had not erred in finding that the plaintiff was not deprived of equal protection by enforcement of the zoning ordinance against her but not against others where her violation was much more serious than the others. The plaintiff had failed to show that she was the victim of malicious motive to injure her or that she was similarly situated to other violators.

In this case plaintiffs' attempt to show that defendant Rigatti acted with malicious motive but acually show no more than that she had legitimate concerns about multi-family developments. They also fail to show that she caused the denial of their application for building permits.

As to defendant Walker, who did deny plaintiffs' application for building permits, plaintiffs have failed to produce any evidence that they were injured as a result of being treated different from their competitor, Brush Run, at any identifiable time. Therefore as to plaintiffs' equal protection claim defendants' motion for summary judgment should be granted.

C. Conspiracy to Violate the Constitution in Violation of 42 U.S.C. Section 1983

Plaintiffs' amended complaint alleges that defendants Urbanowicz and Rigatti conspired with unidentified other defendants for the common goal of depriving plaintiffs of "rights guaranteed to them under Article 1, Section 10 of the United States Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution." Plaintiffs have produced no evidence of any agreement among any defendants to violate plaintiffs' constitutional rights. Therefore, as to this claim defendants' motion for summary judgment should be granted.

D. Anti-Trust Claims

Finally, plaintiffs assert that defendants have violated both the Sherman Act, 15 U.S.C. Section 1 and the Clayton Act, 15 U.S.C. Section 15. The facts set forth in support of these claims are those discussed under plaintiffs' equal protection claim. As has already been noted, plaintiffs have failed to show that they were treated different from any other party similarly situated. The ordinance which was originally applied to plaintiffs was rescinded and after it was rescinded it was not applied to either plaintiff or Brush Run. Therefore plaintiffs have failed to show any agreement or conspiracy in restraint of trade. The most they have shown is hostility toward them on the part of defendant Rigatti in that she opposed muti-family dwellings in general and hostility on the part of defendants Rigatti and Urbanowicz in that they did not like one of plaintiffs' employees, Raymond Kirich. They have produced no evidence of any agreement among any of the defendants to reduce competition between plain-

tiffs and Brush Run. Further, under the *Hallie v. Eau Claire,* 471 U.S. 34 (1985), municipalities are exempt from anti-trust liability for activities authorized by state statute. Pennsylvania law, 53 P.S. Section 10601 authorizes municipalities in Pennsylvania to "enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act." Section 10603 provides that the zoning ordinances may contain "provisions for the administration and enforcement of such ordinances" and "Such other provisions as may be necessary to implement the purposes of this act." If defendants can show that their alleged "anticompetitive activities were authorized by the state 'pursuant to state policy to displace competition with regulation or monoply public service' " they would be entitled to municipal immunity under *Hallie.* Therefore, as to this claim defendants' motion for summary judgment should be granted.

E. Plaintiffs' Motion for Summary Judgment

Plaintiffs' motion for summary judgment is based on the fact that Walker's denial of their application for building permits was ultimately determined by the state courts to be in error. That does not establish a violation of the Constitution. In *Pace Resources, Inc. v. Shrewsbury Twp.,* 808 F.2d 1023, 1034 (3d Cir. 1987), the court stated:

> We conclude at the outset that the district court erred in holding that it was bound to find a denial of substantive due process once the Commonwealth Court termed the Township's rezoning "arbitrary and unjustifiably discriminatory." The issue before that court and the substantive due process issue presented to the district court by Pace's complaint are simply not the same issue.

Therefore plaintiffs' motion for summary judgment should be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

/s/ ILA JEANNE SENSENICH
Chief U.S. Magistrate

Dated: April 28, 1987

cc: The Honorable Gustave Diamond
United States District Judge

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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Simmons Park Properties, Inc. v. Bethel Park Municipal Council, et al.

Mandamus—Building Permit—Phased Development.

1. A mandamus is an extraordinary writ at common law designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff.

2. Where defendant-municipality had approved a five-phased development but no evidence supported the conclusion that as a condition of approval such development was to be sequential by phases, plaintiff-developer was entitled to develop the phases in any order and a building permit should issue accordingly.

(*D. E. Williams*)

Michael P. Schaefer for plaintiff.

Victor R. Della Donne for defendants.

GD 79-15304. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION AND ORDER OF COURT

Papadakos, A.J., May 5, 1981.—The matter before the Court is an action in mandamus brought by Simmons Park Properties, Inc., (Plaintiff) against the Bethel Park Municipal Council; the Municipality of Bethel Park; James M. Martin, the Municipal Manager; Norman Walker, the Code Enforcement Officer, and John E. Kanon, the Planning Director (Defendants). The Complaint and Amended Complaint seek the issuance of certain building permits. Plaintiff is record title holder to 33 acres in Bethel Park. Plaintiff initially submitted the Simmons Park Village Site

Plan to the Municipality's Planning Commission in July of 1976. That plan divides the 33 acre tract into a 254 unit development of townhouses and duplex residences. The plans as submitted parcel off the 33 acre tract into five groupings categorized as "Phases."

After various meetings with the Planning Commission, approval was given for the Site Plan submitted by Plaintiff on August 18, 1976. The Planning Commission also recommended that the Council of Bethel Park approve the Site Plan. That body approved the Site Plan on October 19, 1976, and Plaintiff began development of those units in 1979. Plaintiff applied for building permits in May of 1979 to continue development of its Townhouses and was refused on May 9, 1979, by Defendants upon the contention that the development was approved as a five phase development, and that the applied for building permits were in an area of the development which was not in what Defendants considered to be the second phase. It was from that decision that Plaintiff timely filed this action in mandamus on June 8, 1979. A Motion for Peremptory Judgemnt was also filed seeking the issuance of the desired building permits. The Honorable J. Warren Watson, appointed a Referee in this matter to take any additional testimony and submit proposed findings and conclusions of law. The Referee filed a tentative decision, recommending denial of the Peremptory Judgment. By his Opinion and Order of Court dated March 26, 1980, Judge Watson granted the Motion for Peremptory Judgment and ordered that building permits be issued anywhere in Phase II of the development. On January 23, 1981, Judge Watson vacated his Opinion and Order of March 26, 1980, and denied Plaintiff's Motion for Peremptory Judgment.

This Court then ordered a hearing pursuant to the underlying Complaint in Mandamus for March 20, 1981. At that hearing the parties had the opportunity to present any testimony and evidence in this matter. During the hearing it became apparent that the only issue before the Court was whether the Site Plan as approved by Council required development in phases in numerical order (Phase I, then Phase II, then Phase III, etc.). The parties were then given the opportunity to provide the Court with some written requirement or written agreement showing that development would occur only in order of the phases as numbered. Thereupon, Plaintiff and Defendants prepared and submitted oral and written memoranda in this matter.

A mandamus is an extraordinary writ at common law, designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the Plaintiff, a corresponding duty in the Defendant, and want of any other adequate and appropriate remedy. Bronson v Com. Bd. of Probation and Parole, — Pa. S.—, 421 A.2d 1021 (1980); Philadelphia Newspaper Inc. v Jerome, 478 Pa. 484, 387 A.2d 425 (1978). A court of law of competent jurisdiction issues a mandamus to a public official directing him to perform a particular duty which results from his official station or operation of law. Goodman v Meade, 162 Pa. Super 587, 60 A.2d 577 (1948). A mandamus will not lie to compel discretionary acts, nor will it be issued to restrain official duties.

In this matter, there is no dispute that the Municipal Council approved a Site Plan. The only dispute is whether the grouping of units into five parcels described as "Phases" binds the Plaintiff to develop the units in the Phases as numbered on the Plan. This Court can find no

evidence besides the Plan itself, which shows the numbered phases, to support Defendants' position of sequential development. Nor has any written agreement or understanding between the parties been brought to this Court's attention supportive of Defendants' position.

This Court, therefore, finds that the numbering of the five parcels as Phases does not limit the Plaintiff to development of its lots in numerical order of Phases. (Phase I, then Phase II, then Phase III, etc.). Rather, this Court finds that the adoption by the Municipal Council of the entire Site Plan gives Plaintiff the right to develop its units as it finds proper. Furthermore, once Defendants approved the Site Plan, Plaintiff had a clear right to the issuance of building permits for the units Plaintiff desired to develop and Defendants had no discretion in granting or denying such permits.

Accordingly, the following Order of Court is entered:

ORDER OF COURT

And Now, to-wit, this 5th day of May, 1981, It is Hereby Ordered, Adjudged and Decreed that the decision of Bethel Park Municipal Council; the Municipality of Bethel Park; James M. Martin, Municipal Manager; Norman Walker, Code Enforcement Officer; and John E. Kanon, Planning Director, (Defendants) refusing to issue building permits to Simmons Park Properties, Inc. (Plaintiff) be, and the same is hereby, REVERSED, and that the Defendants are directed to issue the desired building permits.

By the Court:

/s/ Papadakos, A. J.

No. 88-91 (2)

IN THE

Supreme Court of the United States

October Term, 1988

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Respondents,

vs.

NORMAN L. WALKER, JOHN E. KANON,
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,
HARRY E. BABINGER, JAMES E. HADSEL,
YVONNE A. RIGATTI, GLENN TRAUTMAN,
WILLIAM W. RUHL, WILLIAM G. DODDS,
PATRICIA M. PRICE, CONCETTA SERDY,
and REID W. McGIBBENY, individuals,

Petitioners.

DINO BELLO, an individual and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Respondents,

vs.

MUNICIPALITY OF BETHEL PARK,

Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER IT HAS BEEN ESTABLISHED THAT THE MUNICIPALITY ACTED THROUGH A MINORITY OF COUNCIL MEMBERS?

II. WHETHER THE RATIONAL RELATIONS TEST IS APPLICABLE?

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

The respondents file the following Brief in Opposition to the Cross-Petition for Writ of Certiorari to the Supreme Court of the United States.

Counterstatement Of The Case

The cross-petition for Writ of Certiorari filed in behalf of the cross-petitioners continues to deliberately misstate the basic facts in the case, as cross-petitioners have done throughout the litigation. A site plan was approved by the Council of Bethel Park on October 19, 1976 for 47 units, with the balance of the site approved for 204 units on December 12, 1976, with **no phasing requirement**. The developer finished the first 47 units by May of 1979, and began requesting building permits for the additional 204 units for which site plan approval had been obtained in December of 1976. The Municipal officials and Municipality denied the permits for any additional units.

The five-phase plan for the development had been abandoned before any site plan approvals were submitted to the Council of Bethel Park. The plans considered and approved in October and December of 1976 contained no phases. The earlier five-phase plan, although never submitted nor the subject of any site plan approval, was dredged up by the Municipal officials in May of 1979 as one of a number of pretexts for denying the building permits for the remaining 204 units.

Multiple applications for building permits were submitted and denied during the Spring and Summer of 1979. An action in mandamus was filed in State Court to compel the issuance of such building permits. The mandamus action ultimately resulted in a finding that there was no phasing requirement in any site plan approval by the Municipality, and that the developer had a clear right to all the permits.

The developer filed Complaints in the United States District Court for the Western District of Pennsylvania against Bethel Park's council members, the building

official, Municipal manager and the Municipality itself seeking monetary damages for violations of the developer's rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983. The developer claimed a violation of due process of law and a taking without just compensation.

The District Court granted the defendants' Motion for Summary Judgment in its entirety. The developer appealed to the United States Circuit Court for the Third Circuit. By Opinion filed March 1, 1988, the Third Circuit held that the developer had asserted sufficient fact to demonstrate a violation of its rights to substantive due process in the nature of a deliberate and arbitrary abuse of government power by an interference with the issuance of building permits. The Third Circuit stated that the developer had presented evidence from which a factfinder could reasonably conclude that the action of council members acting in their capacity as officers of the Municipality improperly interferred with the process by which the Municipality issued building permits, and that they did so for partisan, political or personal reasons unrelated to the merits of the application for the permits. These actions, according to the Third Circuit, if proven, are sufficient to establish a substantive due process violation actionable under §1983.

Reasons Relied Upon For The Denial Of The Cross-Petition

A. It Has Not Been Established That The Municipality Acted Through A Minority Of Council Members.

The cross-petitioner concedes that the rationale given by the Third Circuit with regard to the individual defendants is consistent with prior decisions of this court. However, the cross-petitioner argues that there is no legal basis for holding in the Municipality of Bethel Park if only a minority of the members of council acted. Whether a minority of council members acted, or whether certain of the council members who had the personal and political animus caused the entire Council or a majority thereof to act to deny the permits, is a factual issue that must be decided upon a full trial of the case. It is a matter of proof at trial as to just how many council members had improper motives and how many of the other council members may have been tainted by those who had the improper motives.

There is evidence that the entire Council met as a zoning committee and passed on applications for building permits, and evidence that the applications for building permits of the developer came before the entire Council acting as a zoning committee. The decision of such body, which can act only by a majority vote, was to withhold such building permits.

The Third Circuit reversed the grant of summary judgment in behalf of the Municipality of Bethel Park, but did not hold the Municipality liable. It gave the developer the chance to prove its case at trial. The issues on the substantive due process question are not clear enough at this juncture for the Supreme Court to make

any kind of fact-based ruling. As to how many Council members had improper motives and how many of the other council members may have been tainted by those who had the improper motives is a matter for trial. The developer has put forth evidence and will do so at trial to establish that the Municipal Council acted as a body by majority vote, influenced by members with personal and political motives to stop the development.

The cross-petitioners again misstate the facts in this first argument. It was not one permit denied by the zoning officer, but multiple permit applications denied by the Council acting as a body by a majority, which then engaged the manager, planner and building official to implement and communicate such decision of denial.

This case does not deal with a negligent deprivation of rights, nor mere tortious acts of negligence. Rather, the decision to deny the permits was based on improper motives and was a deliberate and arbitrary abuse of government power. As such, it became a matter of Municipal policy since the Council, in multiple meetings, effected a series of consistent decisions to deny the applications for building permits that came in during the Spring and Summer of 1979. The Municipal Council acted as a body under Pennsylvania law and is therefore a supervising policy maker under the circumstances. There was not, as misstated by cross-petitioner, only a single isolated incident of the denial of a permit, but a series of denials which became usage and custom until such time as the developer filed and successfully prosecuted the mandamus action to compel the issuance of all such permits. The Municipal Council, as the developer will prove at trial, and which opportunity the Third Circuit has given the developer, is that the Council made a deliberate choice to follow the course of action to

deny the permits. The alternative was to permit the issuance of the permits since the developer had a clear right to such permits pursuant to the site plan approval of December 12, 1976 for the development of 204 units, without any stipulation with regard to phases.

B. Inapplicability Of Rational Relations Test.

All that the Third Circuit did was reverse the granting of the Municipality's Motion for Summary Judgment. Cross-petitioner has concocted an argument that results in a hitherto unimaginable warping of the Fifth and Fourteenth Amendments' due process clauses. Cross-petitioner argues that its grant of summary judgment on the substantive due process claim should have been upheld by the Third Circuit because cross-petitioners claim there can be a due process violation only if there is no debatable issue of material fact, as cross-petitioner argues at page 12 of its cross-petition.

The general standard for the granting or denial of a summary judgment motion is whether there is a genuine issue of material fact to be decided by the jury or court. Where there is, as here, a genuine issue as to whether the Municipality abused its power or acted without a rational relationship to a legitimate government purpose, no summary judgment may be granted. This is precisely what the Third Circuit held when it reversed the District Court's grant of summary judgment. The case was sent back for trial to determine if in fact the developer can prove its claim.

Cross-petitioner is attempting to have its case disposed of on the Affidavit by the code enforcement official that he denied the permit because of the phasing sequence, and is now asking the Supreme Court that since there is an alleged debatable issue of material fact (*i.e.*, that there

arguably *may* be a rational reason for supporting the permit denial) it should have its summary judgment victory affirmed. This rationale would result in all substantive due process police power cases being disposed of by summary judgment. Cross-petitioner would have no substantive due process case ever go to trial. The Supreme Court should not waste its precious judicial resources on a due process issue that has yet to be fully developed at a trial.

Cross-petitioner confuses cases where there was a denial of zoning approval with the instant case which involves the denial of building permits for no rational governmental purpose *after* all zoning approvals had been achieved. The Third Circuit's decision is in conformity with those cases involving the wrongful and malicious interference with the issuance of permits where there was no basis for withholding such permits, cases where all zoning approvals had been previously obtained as in this case. The case of *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) is a case directly in point where the legislative body intervened in the Municipality's ministerial permit issuance process for reasons of political and personal motives without any conceivable rational basis. The *excuse* given by the Municipality of Bethel Park regarding phasing was found to be totally without merit since the State Court granted the developer's request for mandamus which entails a showing that the developer had a clear right to the permits and the Municipality a corresponding duty to grant them.

CONCLUSION

For all of the foregoing reasons, the petitioners respectfully request that this court deny the cross-petitioner's Petition For Writ of Certiorari.

Respectfully submitted,

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